

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of Pacific Bell Telephone Company (U 1001 C) For Authority Pursuant to Public Utilities Code Section 851 to Lease Space in Administrative Buildings and Central Offices and to Transfer Assets to SBC Advanced Solutions, Inc.

Application 00-01-023
(Filed January 14, 2000)

**ADMINISTRATIVE LAW JUDGE'S RULING
GRANTING STAY IN PROCEEDINGS**

1. Summary

Pacific Bell Telephone Company (Pacific) seeks a third stay of proceedings until December 14, 2001, while it decides whether to seek formal authority to transfer \$123 million in assets and other resources to SBC Advanced Solutions, Inc. (ASI). The transfer enables ASI to provide broadband and other advanced services that previously were provided by Pacific. This ruling concludes that the record developed in three days of hearings in December 2001 has become stale, and that a recent Circuit Court decision has changed the ground rules under which ASI operates. Accordingly, while this ruling grants the motion for a third stay of proceedings, it also concludes that the record should be re-opened and further hearings conducted if Pacific decides to go forward with the transfer to ASI.

2. Background

Pacific filed its application to facilitate compliance with the conditions of the October 1999 order of the Federal Communications Commission (FCC)

approving the merger between SBC Communications, Inc. (SBC) and Ameritech Corporation.¹ Pacific's application asked the Commission for authority to lease space and transfer assets to a separate advanced services affiliate, ASI.

Following hearing in December 2000, and during the briefing stage of this proceeding, the United States Court of Appeals for the District of Columbia Circuit decided *Association of Communications Enterprises v. Federal Communications Commission* (D.C. Cir. 2001) 235 F.3d 662. The Circuit Court reversed the FCC's determination that the separate advanced services affiliate could operate free of obligations under the Telecommunications Act of 1996, 47 U.S.C.S. §§ 151 et seq. Instead it ruled, in effect, that ASI is a successor and assign of Pacific and therefore subject to the same resale and other obligations of Pacific under the Telecommunications Act.

Under the terms of the Merger Order, nine months after the court's decision has become final and non-appealable, SBC no longer would be obligated to provide advanced services through a separate affiliate, although it may choose to do so.² The court's decision became final and non-appealable in April 2001, and the Merger Order authorizes advanced services operations of ASI to be brought back into Pacific on or after January 9, 2002.

An Administrative Law Judge's Ruling dated March 9, 2001, stayed this proceeding and a proposed decision. The ruling directed Pacific to file a motion by May 7, 2001, notifying the Commission and all parties of the status of the application and proposing further procedural steps. On May 7, 2001, Pacific filed

¹ *In re Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee* (F.C.C. Oct. 8, 1999) 14 FCC Rcd. 14,712 (hereinafter "Merger Order").

² Merger Order at ¶ 445.

a motion in which it stated that SBC was still evaluating whether to reintegrate advanced services back into Pacific and other SBC incumbent local exchange carriers. Pacific stated that a decision on reintegration was not expected until September 2001, and it requested a further stay until that time, with a further status motion to be filed by August 1, 2001. The stay was granted.

On August 1, 2001, Pacific requested a further stay until December 14, 2001, with a further status report on November 14, 2001. Pacific stated:

“SBC is continuing to evaluate the economic, regulatory and legal implications of reintegrating advanced services operations of ASI into Pacific and the other SBC incumbent LECs. At this time, no final decision has been made on reintegration. We continue to believe that action on Pacific’s Application probably will still be required by the Commission. We also continue to be concerned, however, about recommending any course of action that might turn out not to have been necessary, given the current limited resources of the Commission and the parties.” (Pacific Motion, August 1, 2001, at 3.)

The motion for a further stay was opposed by the Office of Ratepayer Advocates (ORA) and by the California ISP Association, Inc. (CISPA). They recommended dismissal of the application without prejudice to refiling once SBC and Pacific decide what to do.

3. Opposition to Further Stay

ORA presents two arguments in favor of a dismissal without prejudice to refiling. First, it states that the Circuit Court decision changes ASI from an “under-regulated but dominant CLEC,” or competitive local exchange carrier, to a CLEC that this Commission now will regulate more formally. Second, ORA states that the Commission now has information about ASI’s service that was not available a year ago, because ASI has been in operation during the pendency of

this case.³ Based on that new information, ORA states that the Commission may want to reconsider the conditions that it places on the transfer of service from Pacific to ASI.

ORA asserts that Pacific's provision of advanced services through ASI has led to service quality problems and confusion for its customers, particularly in broadband services, including digital subscriber line (DSL) service. ORA states:

"Further delay of this proceeding creates additional uncertainty among ASI's retail and wholesale customers regarding ASI's status and Pacific's compliance with the requirements of the Telecommunications Act of 1996. Further delay also allows ASI to operate as an under-regulated but dominant [competitive local exchange carrier] affiliate and undermines the Commission's ability to protect consumers and secure the public interest." (ORA Response, August 15, 2001, at 3.)

At a prehearing conference conducted on September 14, 2001, CISPA argued that major DSL competitors of ASI have gone out of business or filed for bankruptcy in recent months, and the Commission needs to take that into account in addressing this transfer application.

4. Discussion

As Pacific points out, the parties and the Commission have devoted a great deal of time and effort to this application. There was substantial discovery. Three days of hearings took place on December 5, 6, and 7, 2000. Lengthy briefs were filed in January and February 2001. After the Circuit Court decision was

³ Pacific has transferred employees, assets, and space to ASI pursuant to General Order 69-C, which permits a utility to grant revocable licenses for limited uses of utility property without further authorization by the Commission. The property and space were transferred under revocable licenses and leases, but Section 851 approval is sought to make the transfers permanent.

issued on January 9, 2001, all parties agreed that a brief stay was sensible to give Pacific and SBC time to decide whether to withdraw this application and transfer employees and assets from ASI back to Pacific and to SBC's other local exchange carriers. For much the same reason, a second stay was granted on June 1, 2001.

While this ruling grants the motion for a third stay of proceedings, it also finds merit in the objections of ORA and CISPA that changed conditions require further evidence if the transfer of assets goes forward. Even now, it would be difficult to craft a decision on the record that is before the Commission. Much has happened in the DSL industry since the hearings in this case last December. The ASI that emerges from the Circuit Court order will be a different entity from the ASI that was considered in the testimony and pleadings. The conditions that the Commission was asked to impose as part of the transfer of assets and personnel may or may not be appropriate in view of these changed circumstances.

If a further stay is granted, ORA proposes reopening the record to take additional evidence on the changes that have occurred since our last hearing. This ruling concludes that additional evidence will be required if Pacific decides to go forward with its proposed transfer of assets to a newly constituted ASI.

Accordingly, if Pacific and its parent company decide not to go forward with a transfer to ASI, Pacific presumably would withdraw this application and bring people and assets back to Pacific. If Pacific and its parent company decide that they will go forward with a transfer to ASI, then a subsequent ruling will reopen the record and establish dates for additional testimony and hearing.

IT IS RULED that:

1. This proceeding is stayed until December 14, 2001.
2. Pacific Bell Telephone Company (Pacific) will file a further status report on November 14, 2001.

3. Pacific is directed to notify the parties immediately when a decision is reached on whether to go forward with this application.

4. If Pacific decides to go forward with this application, additional testimony and hearings will be scheduled.

Dated October 22, 2001, at San Francisco, California.

/s/ GLEN WALKER
Glen Walker
Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that I have by mail this day served a true copy of the original attached Administrative Law Judge's Ruling Granting Stay in Proceedings on all parties of record in this proceeding or their attorneys of record.

Dated October 22, 2001, at San Francisco, California.

/s/ KE HUANG

Ke Huang

N O T I C E

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